

REMARKS

Reconsideration of the application is respectfully requested.

I. Rejection Under Judicially Created Doctrine of Obviousness-Type Double Patenting

The Examiner has rejected claims 1-12 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 10, 12, and 19 of U.S. Patent No. 6,136,366. The Examiner admits that the conflicting claims are not identical, but believes they are not patentably distinct from each other.

While the Applicants respectfully disagree, Applicants are submitting herewith a terminal disclaimer in order to expedite the prosecution of the present patent application and to further business objectives. In view of the same, it is respectfully submitted that the obviousness-type double patenting rejection should be withdrawn and rendered moot.

II. Rejection Under 35 USC §112, First Paragraph

The Examiner has rejected claims 1-6 under 35 USC §112, first paragraph. In the rejection, the Examiner mentions that the claims fail to comply with the enablement requirement since the claims contain subject matter which is not described in the specification. Applicants, have amended claim 1 to be consistent with the language on page 5 of the specification. Therefore, Applicants submit that the rejection made under 35 USC §112, paragraph 1, should be withdrawn and rendered moot.

III. Rejection Under 35 USC §112, Second Paragraph

The Examiner has rejected claims 1, 6, 7 and 12 under 35 USC §112, paragraph 2. In the rejection, the Examiner mentions, in summary, that claims 1, 6, 7 and 12 are indefinite because it is not known what is meant by the "spreadability" language.

Applicants respectfully disagree that such language is indefinite. Particularly, Applicants direct the Examiner's attention to page 13 of the specification where spreadability is very specifically defined and the means for determining the spreadability is also defined.

Particularly, spreadability is obtained by measuring the peak force from squeeze flow tests on the analytical instruments described. In view of this, Applicants respectfully request that the rejection made under 35 USC §112, second paragraph be withdrawn and rendered moot.

IV. Rejection Under 35 USC §103

The Examiner has rejected claims 1-12 under 35 USC §103 as being unpatentable over Wong et al., U.S. Patent No. 5,693,357, in view of Wong et al., U.S. Patent No. 5,079,027, Wong et al., U.S. Patent No. 5,885,645, Fix et al., U.S. Patent No. 5,714,193 and Meade, U.S. Patent No. 6,010,737 (hereinafter, '357, '027, '645, '193, and '737, respectively). In the rejection, the Examiner mentions, in summary, that Wong discloses a nut butter containing nut ingredients, seasonings, stabilizer, emulsifier and bulking agents with a particle size distribution of which 90% of the particles are less than 40 microns, and 50% of the particles are smaller than 10 microns. The Examiner admits that claim 1 of the present invention is distinguishable from Wong in that the

present invention requires 50% of its particles to be smaller than 3 microns and 1.4% of the particles to be larger than 58.7 microns to produce a particular spreadability.

In an attempt to cure the vast deficiencies of the primary reference (namely the '357 reference) the Examiner relies on the '027 reference which discloses a composition having 80% of the particles between 2-11 microns. The Examiner further relies on the '645 reference which discloses a process for milling nuts to various micron sizes and the '193 reference which discloses a process for milling nuts to a mean size of 10.5 microns. The Examiner also relies on the '737 reference for disclosing a process for milling nuts to various particle sizes. The Examiner believes that nothing new is seen in a composition with small amounts of particles being larger than 58.7 microns as in crunchy peanut butter. Moreover, the Examiner concludes that the viscosities of claim 2 are obvious, that it would be obvious to vary particle sizes to achieve a particular nut size, and that the '357 reference discloses reduced fat peanut spreads. Based on the above, the Examiner believes that claims 1-12 are obvious in view in the multitude of references relied on herein.

Notwithstanding the Examiner's apparent position to the contrary, it is the Applicants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

The present invention is directed to a superior nut butter made via a gap mill process to produce a product which is very spreadable and that takes less force to spread with a knife. Independent claim 1 describes a nut butter or nut spread composition comprising (a) a nut ingredient, (b) from about 0-10% seasonings, (c) from about 0.5 to 2.5% stabilizer, (d) from about 0-1% emulsifier, and (e) from about 0-60% bulking

agent whereby the particle size distribution of the nut butter or nut spread composition has a lower percentage of fine and coarse size particles and a higher percentage of medium size particles such that at least 90% of the particles are smaller than about 40 microns, at least 50% of the particles are smaller than about 3 microns and 1.4% of the particles are larger than 58.7 microns wherein the composition has a spreadability of about 4.000 kilograms to about 5.300 kilograms.

The invention is further defined by the dependent claims which claims, among other things, specific viscosities, the type of nut ingredient, the addition of oil, and a spreadability from about 4.915 kilograms to about 5.215 kilograms.

Independent claim 7 is directed to a reduced fat nut spread comprising (a) a nut ingredient, (b) from about 0-10% seasonings, (c) from about 0.3 to 2.5% stabilizer, (d) from about 0-1% emulsifier, and (e) from about 0-60% bulking agent wherein the particle size distribution of the nut spread composition has a lower percentage of fine and coarse size particles and a higher percentage of medium size particles such that at least 90% of the particles are smaller than about 40 microns, at least 50% of the particles are smaller than about 10 microns, at least 10% are smaller than about 3 microns and 1.4% of the particles are larger than 58.7 microns, the composition having a spreadability of about 4.000 kilograms to about 5.300 kilograms.

The composition of claim 7 is further defined by the dependent claims which claim, among other things, specific viscosities, the type of nut ingredient, the addition of oil and a spreadability from about 4.915 kilograms to about 5.215 kilograms.

In contrast, the '357 reference merely discloses a nut paste having a particular monomodal particle size distribution. The monomodal nut butters and spreads of the '357 reference typically comprise from about 50% to 100% of a nut paste with water insoluble solids comprising a particle size of less than about 21.6 microns.

The '357 reference does not, even remotely, teach, suggest or describe the important and critical limitations set forth in independent claims 1 and 7. In an attempt to cure the vast deficiencies of the '357 reference, the Examiner relies on the '027 reference, the '645 reference, the '193 reference, and the '737 reference, all of which disclose a variety of pastes having particle size distributions that do not suggest or render obvious the size distribution set forth in the present independent claims. Moreover, there is no teaching whatsoever that suggests the spreadability (as clearly defined in the specification) of the nut butter compositions set forth in the present claims. Applicants respectfully submit that it is improper for the Examiner to rely on a multitude of references and suggest that peanuts can be ground to a particular size in order to produce a particular spreadability. Applicants have demonstrated in the examples that the peanut butter composition of the present invention has a spreadability that is far superior to that of conventional brands. Since the Examiner has not found a combination of references that even remotely suggests the limitations of the presently claimed invention, Applicants herein submit that the rejection made under 35 USC §103 is improper and should be withdrawn and rendered moot.

It is respectfully submitted that all claims of record are now in condition for allowance. Reconsideration and favorable action are earnestly solicited.

In the event the Examiner has any questions or concerns, she is kindly invited to contact the undersigned at her earliest convenience.

Respectfully submitted,



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